SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

EX PARTE OR LATE FILED

October 2, 1998

Regina Keeny, Esq.
Chief, International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, DC 20554

Re: *Ex Parte* Presentation
DBS Public Service Obligations
(MM Docket No. 93-25)

Dear Ms. Keeney:

The Satellite Broadcasting and Communications Association ("SBCA"), pursuant to section 1.1206 of the Commission's Rules and the above-referenced proceeding, hereby submits its further analysis of the meaning of the term "editorial control" as used in Section 25(b) of the 1992 Cable Act. Since our December 22, 1997, *ex parte* filing on the meaning of "editorial control," several other parties have made *ex parte* presentations advancing new grounds in support of their particular interpretation of that term. Having reviewed each of these subsequent *ex parte* presentations, SBCA makes this further *ex parte* presentation in support of the construction of "editorial control" advanced by the Untied States Satellite Broadcasting Company, Inc. ("USSB") in it's *ex parte* letter dated October 2, 1998.

USSB submits that "editorial control" as used in Section 25(b) of the 1992 Cable Act means only that direct broadcast satellite ("DBS") providers may not edit or censor material within noncommercial programs aired on the reserved channels, but does not limit the DBS provider's right to select the programming best suited to meet the needs and interests of the subscribers to the particular DBS service. USSB advances three grounds in support of it's construction of the term "editorial control."

First, USSB reasons that the pro-competitive purpose of the 1992 Cable Act compels a definition of "editorial control" that will foster DBS competition with cable. USSB correctly noted that a principal goal of the 1992 Cable Act is to encourage competition with cable from alternative multichannel video technologies and, in particular from DBS. In furtherance of this goal, DBS providers must be able to select the noncommercial programs that will best complement the existing programs in their particular programming packages. Indeed, the DBS provider is in the best position to

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select noncommercial programs that will enhance the value of its programming and be meaningful to its subscribers. Correspondingly, the broader definition of "editorial control" advanced by others – that DBS providers may not select the programs to be aired on the reserved channels – would seriously undermine the ability of DBS providers to compete with cable and, therefore, must not have been intended by Congress. Accordingly, in order to further the primary purpose of the 1992 Cable Act to encourage the development of robust competition in the multichannel video programming marketplace, the Commission should define "editorial control" to mean only that the DBS provider may not edit or censor noncommercial programs provided pursuant to Section 25(b).

Second, USSB asserts persuasively that under Chevron the Commission may interpret the term "editorial control" differently in Section 25(b) and Section 612 (the cable "leased access" provisions) of the 1992 Cable Act because the two sections serve quite distinct purposes and apply to different media. Chevron U.S.A., Inc. v National Resources Defense Council, Inc. 467 U.S. 837 (1984); see also, Common Cause v Federal Election Commission, 842 F.2d 436, 441-442 (1988) (upholding two different interpretations of the term "name" where FEC provided reasonable explanation); National Ass'n of Casualty and Surety Agents v. Board of Governors of the Fed. Reserve Sys., 856 F.2d 282, 287 (D.C. Cir. 1988) (upholding different agency interpretation of same phrase when based on reasonable explanation), cert. Denied, 490 U.S. 1090 (1989); Comite Pro Rescate v. Sewer Auth., 888 F.2d 180, 187 (1st Cir. 1898) (same), cert. Denied, 494 U.S. 1029 (1990). As discussed in detail in our December 22 *ex parte* submission, which we incorporate herein by reference, Section 25(b) and Section 612 serve very different purposes and, therefore each section may support a different interpretation of the term "editorial control." In addition, it is axiomatic that DBS and cable are different media and, consequently, the Commission may adopt a definition of "editorial control" as used in Section 25(b) that is different than the meaning of that term in section 612. Accordingly, consistent with its sole and limited purpose of providing a minimum level of educational programming, as used in section 25(b), "editorial control" must mean only that DBS providers may not edit or censor programs provided pursuant to that section, but does not limit the DBS provider's right to select the programming to be aired on the reserved channels.

Finally, SBCA agrees with USSB that section 25(b) achieves its regulatory purpose of ensuring a minimum level of educational programming by requiring DBS providers to set aside a required percentage of its channel capacity for such programs and by prohibiting DBS providers from editing or censoring the noncommercial programs. The broader definition of "editorial control" advanced by others -- that DBS providers may not select the programs to be aired on the reserved channels -- would

not serve any identifiable regulatory purpose of significance to justify the additional burdens it would impose on DBS providers. Therefore, in the absence of any evidence identifying a legitimate governmental interest to be served by further restricting the journalistic freedom of DBS providers, there is no basis for the Commission to adopt a broad definition of the term "editorial control."

In conclusion, USSB has correctly reasoned that the only definition of "editorial control" that would be consistent with the pro-competitive purposes of the 1992 Cable act and the sole and limited purpose of Section 25(b) -- to provide a minimum level of educational programming -- is one that defines the term to mean only that DBS providers may not edit or censor noncommercial programs provided pursuant to Section 25(b), but does not limit the DBS provider's right to select the programming to be aired on the reserved channels. SBCA urges the Commission to adopt this construction of the term "editorial control" as used in Section 25(b) of the 1992 Cable Act.

Respectfully submitted,

Andrew R. Paul
Senior Vice President

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SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

December 22, 1997

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Re: Ex Parte Presentation, Direct Broadcast Satellite Service Obligations, MM Docket No. 93-25

Dear Ms. Keeney:

The Satellite Broadcasting and Communications Association ("SBCA"), pursuant to Section 1.1206 of the Commission's Rules, hereby submits the following analysis of the meaning of the term "editorial control" as used in Section 335(b) of the Communications Act of 1934, as amended (the "Act"), that is implicated in the above-referenced proceeding. Section 335(b) obligates direct broadcast satellite ("DBS") service providers to reserve a certain portion of their channel capacity for the carriage of non-commercial programming of an educational and informational nature.

Section 335(b)(3) prohibits a DBS service provider from exercising "any editorial control over any video programming provided pursuant to this subsection." Although this subsection prohibits DBS service providers from editing the content of the programming carried to meet this obligation, it does not prohibit DBS service providers from exercising discretion in selecting programmers to produce the programs.

Some commentators argue that the language used in Section 335(b)(3) requires the Commission to adopt rules for DBS service providers that mirror the "leased access" provisions applicable to cable operators. Pursuant to Section 612 of the Act, the Commission adopted rules requiring cable operators to make certain channels available to third party programmers on a strict first-come, first-served basis. The rules prohibit a cable operator from selecting or refusing programs or programmers for inclusion on such channels, except that the cable operator may enforce a policy of prohibiting programming that it reasonably believes to be obscene.[1]

A comparison of Sections 335(b) and 612, and their legislative histories, reveals that Congress

[1] Cable Act of 1992, § 10(a)(2), 106 Stat. at 1486.

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did not intend to, and the Commission should not, impose the cable-like leased access structure on DBS service providers. The explicit purpose of the cable leased access provision is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public."[2] In furtherance of this objective, Section 612 provides that a cable operator "shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming"[3] In recognition of the fact that cable operators could make no decisions regarding the programming or the programmers on leased access channels, Congress included in the Act a provision insulating cable operators from criminal and civil liability arising from the programming on leased access channels.[4]

When Section 335(b) is compared with Section 612, it is obvious that the obligations of DBS service providers arise from a different purpose and are embodied in completely different legislative language than the obligations of cable operators under Section 612. Accordingly, Section 335(b) does not require the Commission to adopt cable's leased access rules for DBS service providers.

First, while Congress looks to DBS to promote competition to cable, the purpose of Section 335(b) itself is not "to promote competition" and "to assure the widest possible diversity of information sources" but "to define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming."[5] The legislative history of cable's leased access provisions indicates that the legislation was "largely designed to remedy market power in the cable industry."[6] Congress was concerned that the increased concentration and vertical integration in the cable industry would become barriers to entry for new programmers and reduce the number of media voices available to consumers.[7] Congress recognized that cable and DBS operate in different market settings. Cable, with rare exceptions, operates as a monopoly in its franchised area. Consequently, customers desiring cable service have no choice regarding the provider of that service. In contrast, DBS operates in a competitive market setting. At present, customers desiring DBS service may choose from among four DBS systems. No concentrated market power exists within the DBS service. In the Cable Act of 1992, Congress declared its policy to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media."[8] At the

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[2] Communications Act of 1934, § 612(a) (codified at 47 U.S.C. § 532(a)).

[3] 47 U.S.C. § 532(c)(2).

[4] *See* 47 U.S.C. § 558.

[5] H.R. Conf. Rep. No. 102-862, at 100.

[6] S. Rep. No. 102-92, at 30.

[7] *See* Cable Act of 1992, § 2(a)(4)-(5), 106 Stat. 1460-61.

[8] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 2(b)-2(b)(1), 106 Stat. 1460, 1463 (codified as amended in scattered sections of 47 U.S.C.).

same time, Congress expressed its desire to "rely on the marketplace, to the maximum extent feasible."[9] Because DBS systems operate in a competitive market setting, Congress intended for DBS service providers to be permitted to rely on the marketplace to effectuate the public interest in access to diverse sources of information.

In addition, the statutory language of Section 335(b) differs from the language in Section 612 in several important respects. Section 335(b) requires that the reserved DBS channel capacity be used "exclusively for noncommercial programming of an educational or informational nature." Thus by statute, the DBS service provider is required to determine whether the programming is of an educational or informational nature, and as a result, a DBS service provider must make certain decisions regarding the eligibility of the programming, as well as the program service.

Section 335(b) does not contain the more specific restriction on the exercise of editorial control set forth in Section 612. Although both sections provide that the relevant provider "shall not exercise any editorial control over any video programming provided," only Section 612 contains the provision "or in any other way consider the content of such programming." As explained above, Section 335(b), by its terms, requires the DBS service provider to consider the content of the programming.

As further evidence of the distinctions on the levels of editorial control in the two statutes, Congress did not adopt a content immunity provision applicable to DBS service providers as it did for cable operators. The absence of this immunity provision is clear evidence that DBS service providers were not to be forced to accept any programming on their reserved channels. Since DBS service providers may choose among qualified programmers, there is no need for a grant of immunity.

Moreover, neither Section 335(b) itself nor its legislative history indicates that the "no editorial control" language in Section 335(b)(3) refers to a strict "first-come, first-served" basis of allocation for DBS reserved capacity. In fact, the legislative history suggests otherwise. Both the House and Senate bills originally provided for the creation of a study panel to make recommendations on various issues relating to DBS regulation, including methods for selecting programming.[10] Although this provision was not included in the final bill, if Congress had intended for the allocation of reserved capacity to be on a first-come, first-served basis, it would not have proposed a study panel to recommend methods for the selection of programming to begin with. The conference committee clearly provided for the DBS programmer to determine whether the programming to be presented is of an "educational or informational nature."

Thus, contrary to the arguments of some, there is nothing in the purpose, statutory language, or legislative history of Section 335(b) to suggest that DBS service providers are to be governed by the same editorial control restrictions that apply to cable operators through the leased access provisions. By its own terms, Section 335(b) is designed to ensure that the reserved DBS channels are used by certain identified types of programmers for specific types of programming. Accordingly, a DBS

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[9] *Id.* § 2(b)(2).

[10] S. Rep. No. 102-92, 15 92; H.R. Rep. No. 102-628, at 125.

operator must make a determination that the programmer and programming on these channels meet the requirements of the statute. So long as the DBS service provider does not control the content of the programming, there is no statutory prohibition that prevents the operator from selecting among various programmers that meet the criteria.

Finally, the Commission's treatment of programming selection when adopting rules to govern children's programming provides guidance as to how the Commission should proceed when adopting rules governing the reservation of DBS channels for educational and information programming. Although rules were adopted requiring licensees to air programming that is specifically designed to serve the educational and informational needs of children, the Commission defers to the good faith judgment of broadcasters in determining whether a program meets the criteria of educating and informing children. Similarly, the Commission should rely on the good faith judgment of the DBS service provider to determine whether the reserved programming is of an educational or informational nature. Arguably, the statutory language commands as much.

Respectfully submitted,

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